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In the Supreme Court of the United States

OCTOBER TERM, 1997

HONORABLE L. L. SAWYER, Judge of the Circuit Court of the State of Oregon for Jackson County,

Petitioner,

v.

STATE OF OREGON ex rel MARK HUDDLESTON, District Attorney for Jackson County,

Respondent,

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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BRIEF OF HANS A. LINDE AND DAVID B. FROHNMAYER AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

Hans A. Linde is a retired judge of the Oregon Supreme Court and a long-time professor of constitutional law.

David B. Frohnmayer has been Dean and Professor of Law at the University of Oregon, a member of the Oregon Legislative Assembly, Attorney General of Oregon, and now is President of the University of Oregon.

The sole interest of both *amici curiae* is in preserving the jurisdiction of Oregon courts to secure the state's continued adherence to constitutional processes of republican government. Both *amici* are members of the bar of this Court.[1] Letters of consent to the submission of this brief are filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

I. The Oregon Supreme Court erred in holding that the United States Constitution deprives state courts of jurisdiction to determine whether a particular governmental process in the state is incompatible with the republican form of government mandated by the Constitution. Other state courts, and the Oregon Supreme Court on earlier occasions, have reached the opposite conclusion on this threshold issue.

The opinion below reached neither the premises nor the merits of the particular claim in this case. The immediate issue is solely the authority of state courts with respect to maintaining republican processes in their own states. The case does not require this Court to reconsider the decision in Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912), with respect to a

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[1] This brief was prepared entirely by *amici curiae*, with no contribution of content or funds by any interested party or their respective counsel.

federal judicial role under the Guarantee Clause, U.S. Const., Art. IV, § 4. Pacific States did not hold or suggest that the Oregon court lacked authority to decide against the merits of the telephone company's claim. This Court's subsequent decisions do not deprive state courts of this authority, as the opinion below mistakenly asserts. Moreover, Pacific States 85 years ago characterized that case as an attack on the entire Oregon government, which can not be said about the present case.

II. The Constitution obligates states to maintain republican forms of government, as this Court has previously recognized. It is not a meaningless obligation. The role of state courts in guarding their states' adherence to this mandate is a matter of fundamental importance. To impose a federal bar on the authority of the states' judges would be an extraordinary incursion into the states and the very institutions on which the Constitution (in Art. VI, cl. 2) expressly relies for its application in the states.

Modern developments give practical importance to preserving the state courts' authority as a safeguard against departures from republican governance. Congressional intervention in particular governmental actions in individual states is not a realistic alternative. Nor is federal intervention necessary as long as the state's own legal institutions can preserve republican processes. State officials, particularly attorneys general, face serious claims of this nature. State governments, their courts, and their people should not be left under a misapprehension that this Court forbids state judges to carry out their assigned reviews of the decisions of attorneys general and other officials.

ARGUMENT

I. INTRODUCTION

Whether the Constitution denies state courts authority to assure adherence to republican government in their own states is a new question in this Court, though not in state courts. The

correct answer rests on historic principles and has important implications.

A. *The Origins Of The Issue.*

Republican government in every state is an essential principle of American constitutionalism. The 1787 constitutional convention placed this principle in the United States Constitution, at a time when the Constitution guaranteed citizens few personal rights within their own states beyond the right to be governed by republican institutions. U.S. Const. Art. IV, § 4. The national guarantee "necessarily implies a duty on the part of the States themselves to provide such a government." Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175 (1874).

Like the present case, Pacific States came to this Court from Oregon, which had adopted lawmaking by initiative in 1902. Within months, before the new system had been used, the Oregon Supreme Court defended its "republican" character. Kadderly v. City of Portland, 44 Or. 118, 74 P. 710 (1903), reh'g denied, 44 Or. 160, 75 P. 222 (1904). Kadderly's reasoning is important, because the Oregon court relied on it in deciding Pacific States in 1912, and because its modern application was the issue that the current court deemed itself precluded from deciding.

Kadderly's anticipatory defense rested on these propositions: (1) The purpose of the Guarantee Clause was to protect the people of the several States against monarchical and aristocratic government and against insurrections and domestic violence,[2] and "to prevent them from abolishing a republican form of government." Kadderly, 74 P. at 719. (2) "A republican form of government is a government administered by representatives

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[2] Here the Oregon court apparently meant the final phrase of U.S. Const. Art. IV, § 4, following the guarantee of republican government.

chosen or appointed by the people or by their authority" (citing James Madison's Federalist No. 39), though the Constitution does not prescribe this representative government to take a particular form. Id. (3) The new provisions for direct popular lawmaking did not alter the form of Oregon's government, because the legislature, governor, and courts continued to exist. (4) "Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes,[3] and may be amended or repealed by the Legislature at will." Kadderly, 74 P. at 720. (The court repeated this important reason in Straw v. Harris, 54 Or. 424, 431, 103 P. 777, 780 (1909).)

Thus the Oregon court defended the system of direct lawmaking in principle, against a wholly abstract attack under the Guarantee Clause, on grounds that the state's existing representative institutions and courts retained the power to override initiated laws, although the voters also could "veto or defeat" bills passed by their representatives. Kadderly, 74 P. at 720. A brief citation to Kadderly sufficed later to reject the attack on the initiated tax in Pacific States, because the tax initiative was a simple statute and subject to judicial review as well as to repeal by the legislature.

This Court dismissed the telephone company's writ of error, holding that it did not have jurisdiction to review claims under the Guarantee Clause. Pacific States, 223 U.S. 118 (1912).[4]

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[3] This observation in 1903, when substantive review under the 14th Amendment had barely begun, meant primarily limitations under the state constitution.

[4] On the same grounds, the Court also dismissed a writ of error in Kiernan v. Portland, 223 U.S. 159 (1912). The Court described the claims presented in that case as "so interwoven as to cause it to be difficult to separate them or state with precision the questions of a Federal nature which they embrace," but concluded that the federal claims were disposed of by the opinion in Pacific States. Kiernan, 223 U.S at 163-164.

Most important, this Court did not hold that the Oregon court lacked jurisdiction for its decision of that claim. The opinion, however, has led to confusion and division in state courts.

Early state cases had followed Oregon's Kadderly opinion to reject attacks on direct legislation on the merits. See In re Pfahler, 88 P. 270 (Cal. 1906), Ex parte Wagner, 95 P. 435 (Okla. 1908). Some state courts continued to do so after this Court denied its own jurisdiction in Pacific States. See, e.g., State ex rel. Foote v. Board of Comm'rs, 144 P. 241 (Kan. 1914), Breedlove v. Suttles, 188 S.E. 140 (Ga. 1936). Other state courts dismissed claims under the Guarantee Clause with simple citations to Pacific States, without analyzing whether that opinion, beyond disowning this Court's responsibility for the guarantee within the federal government, decided anything about state courts. State v. Mountain Timber Co., 75 Wash. 581, 590, 135 P. 645, 649 (1913), aff'd 243 U.S. 219 (1917); Borden v. Louisiana Board of Education, 168 La. 1005, 1023, 123 So.2d 655, 661 (1929), followed in Cochran v. Louisiana State Board of Education, 168 La. 1030, 123 So. 664 (1929), aff'd 281 U.S. 370 (1930).

The majority below mistakenly relied on this Court's affirmance of Mountain Timber and Cochran, unlike its earlier dismissal of the writ of error in Pacific States. In those cases, the appellants raised and the state courts decided other federal questions, which of course precluded dismissing those writs of error for lack of jurisdiction.

B. *Contemporary Conflict In State Decisions.*

Many state courts have continued to consider claims of "nonrepublican" government. In modern examples, the Arizona Court of Appeals, after noting doubts in the trial court about justiciability, rejected on the merits a claim that lawmaking by statewide initiatives is not republican. Iman v. Southern Pacific Co., 435 P.2d 851 (Ariz. App. 1968). The Kansas Supreme

Court sustained a constitutional amendment allowing the Governor to reorganize executive departments. Van Sickle v. Shanahan, 511 P.2d 223 (Kan. 1973). The Oklahoma Supreme Court considered a challenge to a constitutional amendment requiring referenda on tax measures, despite arguments that the issue was nonjusticiable. In re Initiative Petition No. 348, 820 P.2d 772 (Okla. 1991). See also, Cagle v. Qualified Electors of Winston, 470 So.2d 1208 (Ala. 1985) (deciding challenge to a "special law" for a county referendum); Walling v. North Central Texas Municipal Water Authority, 359 S.W. 2d 546 (Texas App. 1962) (deciding challenge to local district scheme of representation); State v. Lehtola, 198 N.W.2d 354 (Wis. 1972) (defending district attorney's power to issue criminal information); In re Interrogatories Propounded by the Senate Concerning House Bill 1078, 536 P.2d 308, 315-18 (Colo. 1975) (defending judicial role in legislative districting); In re Advisory Opinion to the Governor, 612 A.2d 1, 15-16 (R.I. 1992) (deciding a challenge to appointment ethics committee members).

In California, a Court of Appeals declined to decide such a claim with a brief reference to Pacific States, without further analysis. Williams v. City of San Carlos, 43 Cal. Rptr. 486, 489 (1965). The California Supreme Court, which originally adopted Oregon's Kadderly precedent, has not recently considered the issue. The most recent illustration of uncertainty in the states is State v. Manussier, 921 P.2d 473 (Wash. 1996), in which the Washington Supreme Court declared a Guarantee Clause claim nonjusticiable but proceeded to decide the merits anyway.

The Oregon Supreme Court itself has taken conflicting positions on its powers after Pacific States. In one case, the court declared itself "bound by the interpretation placed on the Constitution of the United States" that republican government is not a question for judicial inquiry, and therefore "powerless to determine whether or not the constitutional amendment before us violates article IV, § 4 of the Federal Constitution." Baum v. Newbry, 200 Or. 576, 584-585, 267 P.2d 220, 224 (1954).

More recently, however, the Oregon Supreme Court described this Court's position more accurately:

> "[W]ithin the federal government, the enforcement of the guarantee is assigned not to the federal courts but to the political branches. Thus, claims arising under Article IV, section 4, do not present justiciable controversies in federal courts.
>
> "That does not mean that the states may not adjudicate the compatibility of state law with the guarantee clause." State v. Montez, 309 Or. 564, 603-604, 789 P.2d 1352, 1377 (1990) (citation omitted).

In the present case, the majority opinion reverses direction, asserting that this Court has "squarely" held that state courts may not review claims of nonrepublican government, State ex rel. Huddleston v. Sawyer, 324 Or. 597, 932 P.2d 1145 (1997), while the dissenters correctly read Pacific States to deal only with federal courts.

These conflicting state decisions show that state courts need and deserve a clear answer to the doubts thrown on their traditional role in state government. This Court does not readily interfere with that role, even when state courts decide federal questions under circumstances when federal courts would not do so. See, e.g., Doremus v. Board of Education of Hawthorne, 342 U.S. 429 (1952) (dismissing appeal by municipal taxpayers who had standing in state court); Asarco Inc. v. Kadish, 490 U.S. 605 (1989) (reviewing state court judgment on behalf of defendants when plaintiffs had standing in state court, though not in federal court). In Asarco, the separate opinion of the Chief Justice and Justice Scalia pointed out that state courts sometimes have to decide questions of federal statutory and constitutional law affecting "the governance of the state" that this Court cannot review:

> "This is true, but I think it a rather unremarkable proposition. Some state courts render advisory decisions on federal law of no binding force even within the State [citing the Massachusetts and Michigan constitutions]. In each instance, the interpretation of federal law may affect the governance of the state and thereby make some people better off and some worse off. Yet none of these decisions of federal law are reviewable in this or any other federal court." Asarco, 490 U.S. at 636 (Rehnquist, C.J., concurring in part and dissenting in part)[5].

This precisely describes one of the propositions on which the Oregon court erred. No national purpose is served, and potential future harm may be done, by excluding state courts from any role in securing republican government in their own states.

II. LEGAL ANALYSIS

Neither the Constitution nor decisions of this Court deny state courts the authority to review whether a governmental process is incompatible with republican government. The Oregon court's contrary proposition, that the U.S. Constitution prevents state courts from reviewing their states' adherence to republican processes, stands the Constitution on its head. The correct constitutional rule is simple and direct, regardless which approach one takes to constitutional analysis.

1. **Textually**, the Guarantee Clause, U.S. Const. Art. IV, § 4, postulates that the states, those which formed the United States and those admitted later, have entered the Union with republican governments. The United States would guarantee that

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[5] It should be noted that the present case does not involve the concern there expressed by the Chief Justice and Justice Scalia, that a party first raising the federal claim (here the defendant in a criminal proceeding) could claim no actual injury to himself.

the state governments would stay republican. But they had to be republican at the outset. This was and remains a sine qua non of statehood.

Article IV, § 4, therefore, embodies two elements. Primary is each state's responsibility for maintaining a republican government. This is each state's most fundamental duty to the nation and to its own citizens. This Court stated the obvious about each state's own constitutional responsibility, that the clause "necessarily implies a duty of the States themselves to provide such a government." Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175 (1874).

Indeed, if the Constitution meant to leave states free to adopt nonrepublican forms of government, a clause directing the United States to "guarantee to every State in this Union a republican form of government" would be anomalous. The clause imposes on the United States the important but secondary, derivative, duty to assure that each state governs through republican institutions. That national responsibility is not in issue here. But obviously the national commitment to republican state governments is well served when each state takes primary responsibility for republican governance.

The Oregon court does not deny that the Constitution requires Oregon to have a republican government. Yet the opinion ignores whose responsibility it is to make that constitutional determination, just so the court is excused from it. Every state official shares the obligation to govern according to the United States Constitution as well as the state's, and generally swears to do so. But the Constitution expressly holds the states' judges responsible for the officials' compliance. The Constitution is "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. State judges may not refuse to decide a federal issue when its decision is necessary to a case properly before the court. The

Oregon court recognized that duty in Kadderly, Pacific States, and Montez but now refuses it in this case.

2. Historically, republican government was not only an option for which, if chosen, a state might invoke national protection. Rather, republican government was a state's obligation. Insistence that future states be republican dates from the first cessions of the states' western territories to the Continental Congress. It was incorporated in the Northwest Ordinance. See William W. Wiecek, The Guarantee Clause of the United States 17-18 (1972). At the convention, the requirement was postulated by Governor Randolph in the eleventh Virginia resolution, which became the Guarantee Clause, and it was applied in the admission of new states.[6] It continues to be binding law for each state.

"Republican" government, to the drafters of the clause (primarily James Madison and James Wilson) and their colleagues, connoted characteristics beyond merely excluding monarchy or hereditary aristocracy. They also were concerned to assure the safeguards of deliberative institutions and to avoid precipitous acts motivated (in Enlightenment rather than modern terms) by "passion" or "interest." The Constitution does not require a single definition of republican government (the Convention decided not to prescribe uniform state constitutions), but it does require scrutiny for processes that are incompatible with any republican government. Because the decision below ruled only against state court jurisdiction, this brief discusses

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[6] Randolph stated that the resolution had "two objects: first, to secure a republican government; secondly, to suppress domestic commotions." Elliot's Debates, vol. V at 333. He later proposed, with Madison's second, to state even more clearly that "no State be at liberty to form any other than a republican government," a phrasing then restated by James Wilson, with their consent, to state: "That a republican form of government shall be guaranteed to each state, and that each State shall be protected against foreign and domestic violence." Id.

potentially incompatible processes only briefly to show the practical importance of the issue to the states.

3. Structurally, nothing argues against the role of state courts in preserving republican government in their states, and much argues for it. A claim that particular institutional forms or processes of state government depart from republican government may be unfounded, but all such claims cannot be dismissed summarily. State government structures do not follow the national model of a single source of legislation, administered by agencies that are created and funded by the legislature and directed by a single elected chief executive. Thus various forms of governmental power exercised by independent executive officials, or by local or essentially private entities, as well as some types of initiatives, have been challenged as "nonrepublican" and reviewed by state courts.

When such a constitutional claim is raised, whatever its merits, some official in the state must and does decide it. It may be an elections officer (in Oregon, the Secretary of State), and usually the state's separately elected attorney general, a political official. No functional reason supports making their legal opinions nonreviewable in the state's courts. If Oregon's Secretary of State had disqualified the disputed initiative in this case as an ineligible departure from republican lawmaking, must its sponsors be denied judicial review of that official's action? To the contrary, courts are the chief institutions designed to decide such disputes in a principled fashion, after briefing, argument, and collegial discussion, with opinions based on reasons that apply beyond the single case. Indeed, a substantial number of states call upon the courts to do so in advisory opinions. See, e.g., In re Interrogatories Propounded by the Senate Concerning House Bill 1078, 536 P.2d 308, 315-318 (Colo. 1975), In re Advisory Opinion to the Governor, 612 A.2d 1, 15-16 (R.I. 1992).

It is the states' judges that the Constitution expressly binds to give its provisions legal force, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Nothing excludes the states' duty to maintain republican governments from that assignment. Congress could not, under Article IV, § 4, by law exempt a state from the obligation to govern by republican means, nor does Article VI, clause 2, permit Congress to exempt state courts from the obligation to apply the Constitution. The Oregon court erred in thinking that this Court had done either of these things.

4. **Doctrinally**, the majority below erred in relying on Pacific States for the proposition that enforcement of the duty to maintain republican government is "not justiciable" in state courts. State ex rel Huddleston, 324 Or. at 618, 932 P.2d at 1157 (1997). The term "not justiciable" states only a conclusion, not a reason or an explanation.

The holding in Pacific States was to dismiss a writ of error for want of jurisdiction in this Court. The explanation was that Congress, rather than this Court, was charged with the guarantee by "The United States" of republican government in each state. Neither the holding nor the explanation supports the same conclusion for a state court's role in enforcing the state's obligation to govern by republican means.

Chief Justice White's opinion inflated the telephone company's pleading to a "theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon," a contention that, "if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption the initiative and referendum," and, indeed,

would leave Oregon with no governmental functions.[7] Pacific States, 223 U.S. at 141.

Whether or not in 1912 that was a necessary or fair reading of the telephone company's pleading, it does not describe the present controversy. Neither the petition for certiorari nor *amici curiae* attack the initiative system or Oregon's general form of government. To the contrary, *amici* believe that initiatives serve legitimate, useful, and sometimes essential functions. But it is possible for an otherwise soundly republican government to be faced with misuses of the initiative that prevent republican institutions from functioning, or that depart from republican processes on particular issues. Pacific States denied this Court's jurisdiction over a wholesale attack on the entire system, but it said nothing about such counter-republican misuses.

III. THE CONTEMPORARY URGENCY OF THE JURISDICTIONAL ISSUE

Three developments have raised new challenges to initiative measures above other claims of nonrepublican processes. These are (1) the turn to initiating constitutional amendments to put laws beyond legislative change; (2) the effect of initiated tax limitations and mandatory spending on the states' budget process; and (3) initiatives that short circuit the safeguards that deliberation by legislatures and governs provide against majoritarian attacks on vulnerable minorities. If space permitted, each of these could be documented in detail.

1. **The turn to initiated amendments.** The original defense of initiatives, in Kadderly, was that initiated laws would not prevent the existing representative institutions from continued

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[7] The end of the opinion again characterized the telephone company's claim as "an assault . . . on the state as a state," to "demand of the state that it establish a right to exist as a state, republican in form." Pacific States, 223 U.S. at 150-151.

lawmaking. Recent developments have undermined that assumption. Many initiatives now place detailed, extensive laws directly into the constitution in order to prevent legislatures from changing the law or courts from testing them against the state's constitution. Sometimes, as in California, any law enacted upon an initiative can thereafter be changed only by another referendum. See, Cal. Const., Art. II, §§ 16-20. Subordinating representative legislation to plebiscitary lawmaking negates the premise of Oregon's Kadderly precedent, but the Oregon Supreme Court thought that it was forbidden to consider how Kadderly applied in the present case.

2. **Destroying the state's budget process.** Beginning with California's Proposition 13 (Cal. Const., Art. XIII, §§ 1-6), initiatives in a number of states, including Oregon, have written detailed tax limitation programs into the states' constitutions, while other initiative measures have locked into state constitutions programs requiring large expenditures, particularly on the state's criminal justice and penal institutions. Together, these separately enacted tax ceilings and spending mandates drain revenues from other programs, including the constitutionally mandated public schools.[8]

Fiscal initiative amendments may not always depart from republican government, but they show the importance of letting state courts decide such claims, as the Oklahoma Supreme Court did in 1991. In re Initiative Petition No. 348, 820 P.2d 772 (Okla. 1991). In that case, an initiative amendment requiring referenda on most revenue measures was claimed to destroy representative government. Rejecting an argument that the claim was "nonjusticiable," the Oklahoma court stated that "the dispositive question presented is whether the Petition would so

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[8] Had an earlier California initiative mandating state pensions for all Californians not been repealed, its coexistence with Proposition 13 could destroy the essential budgetary function of the state government. See Cal. Const., Art. XXI, repealed by Cal. Const., Art. XXVII.

alter the existing system of government that it would constitute a loss of representative government." In re Initiative Petition No. 348, 820 P.2d at 780. The court acknowledged that state government depended on the legislature's power to raise revenues, but it predicted that the mandatory referral of new taxes would only make representative government more difficult, not impossible.

Two points add importance to this recent decision. One is the Oklahoma court's insight that the effect on representative government is the test whether other lawmaking processes are compatible with republican government. This test followed Kadderly's original analysis. The second point is the court's recognition of the nature of budgeting as an indispensable attribute of organized government. The Oklahoma court did not have to face the interplay between initiated constitutional tax limitations and other initiated amendments forcing large expenditures. The coexistence of such separate initiatives does "so alter the existing system of government that it would constitute a loss of representative government." In budgeting, governors and legislatures must consider and literally, not metaphorically, "balance" all interests in the state's total spending and revenue sources. Voters on separate initiatives cannot balance budgets, and when sponsors choose the form of constitutional amendments, they deliberately destroy the ability of representative government to strike a comprehensive balance.

3. **Circumventing legislative concern for vulnerable minorities.** This Court has had experience with plebiscites on initiatives directed against minorities identified by personal characteristics or beliefs. In 1922, for instance, the anti-Catholic Ku Klux Klan briefly achieved political dominance in Oregon and gained adoption of an initiative aimed at eliminating parochial schools. See Pierce v. Society of Sisters, 268 U.S. 510 (1925). Later examples were the initiatives in Reitman v. Mulkey, 387 U.S. 369 (1967) (California amendment prohibiting open housing laws), in Hunter v. Erickson, 393 U.S. 385 (1969) (Washington

amendment requiring referral of open housing laws), Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) (Washington initiative proscribing means of school desegregation), and the initiatives in Colorado and other states to bar equal rights laws for homosexuals, see Romer v. Evans, ___U.S. ___, 116 S.Ct. 1620 (1996). That the Court found grounds in the 14th Amendment to invalidate these initiatives does not make the manner of their enactment irrelevant, for two reasons.

First, the states' obligation to govern by republican means preceded the 14th amendment by 80 years. Republican government was to preserve liberty by means of deliberative institutions, long before the Constitution protected noneconomic rights of individuals against their own states. James Madison wrote: "It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part." The Federalist No. 51 at 351 (Jacob E. Cooke ed. 1982). He considered "a society under the forms of which the stronger faction can readily unite and oppress the weaker" to be as anarchical as the "state of nature." Id. at 352.[9] The later adoption of the 14th Amendment and this Court's evolving substantive review of state laws did not amend the states' original duty to maintain deliberative governments, nor make it irrelevant. Subsequently, this Court, like James Madison a century earlier, asserted the importance of "republican" state constitutions in setting boundaries to "the sudden impulses of mere majorities." In re Duncan, 139 U.S. 449, 461 (1891).

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[9] Madison's fellow theorist of republican government, James Wilson, was similarly concerned about majoritarian "passions." See, 1 The Works of James Wilson 291 (Robert G. McCloskey ed., 1967). Improper "interest" is illustrated by a recent Washington measure whose sponsors proposed to share the profit of expanded gambling operations with those voters who supported the measure. (See The Oregonian, "Gambling Vote Pays a Jackpot", August 27, 1995, 1995 WL 9185949.) The offer should disqualify the initiative under any republican lawmaking process.

Second, it is not immaterial how a law is made if only its substance does not invade some guaranteed right. Even monarchs (or dictators) make laws that would be valid if enacted by parliaments. But issues of legitimate process logically precede issues of substantive validity. A legitimate process might have produced a different law, or none. Initiatives aside, citizens are guaranteed republican means for state acts that involve no 14th Amendment rights.

Substantive review under the 14th Amendment generally is available only after a measure has been adopted. Some illegitimate procedures, however, matter before the votes are counted. Campaigns on initiatives are not conducted like legislative debates. The targets of an initiative campaign, like the campaigns against parochial schools, against open housing and desegregated schools, and against homosexuals in Oregon and elsewhere, suffer the psychic and social harm of being subjected to the passions of such a campaign and plebiscite (not to mention the financial costs of defending against it), whether or not the measure ultimately passes.[10] When the process itself is not legitimate, they should not have to await a later adjudication of the substance of the measure. If, however, an official decides that such a proposed initiative diverges from republican lawmaking, there also is no reason for precluding the state's courts from reviewing that decision.

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[10] The character of the Oregon initiative campaign against homosexuals is briefly indicated in Hans A. Linde, When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality, 72 Or. L. Rev. 19, 35-38, 42 n. 83 (1993). In a statement on that campaign, the Oregon Catholic Conference of Bishops deplored that the initiative measure did not "provide an appropriate forum for to discuss in a reasonable and civil manner the important social issues involved," and that its proponents "inappropriately used" the initiative "to promote what they view as a referendum on the morality of homosexuality." Id.

IV. STATE COURT REVIEW FOR REPUBLICAN PROCESSES IS NOT UNWORKABLE

This Court may agree that the issue of state court authority is novel, important, and unsettled among state courts, yet perceive a seeming anomaly in state court review of their states' compliance with a constitutional obligation that this Court itself has declined to adjudicate. Nonetheless, that concern would deserve an opinion, not denial of review.

The Court could always reexamine Pacific States and distinguish its description of an attack on a state's whole legal system from narrower claims that a particular governmental process departs from republican governance. *Amici curiae* believe that this step is warranted, but that the present case still should be remanded for an opinion from the Oregon court. Even without such a step, the Court should not preclude normal state court review of such claims, for the following reasons.

1. Each state's constitutional obligation to maintain republican governments exists independently of the assignment within the national government of the political acts to guarantee it. The federal "political question doctrine" (if it applies to narrowly focused, specific legal claims at all) properly concerns the national guarantee, not the state's obligation.

2. Insofar as that doctrine rests on the premise that Article IV, § 4, "textually commits" the guarantee to the political branches, it is even clearer that Article VI, clause 2, "textually commits" each state's judges to assuring compliance with the United States Constitution. Their responsibility is not a secondary result derived from this Court's appellate jurisdiction. Cf., People v. Western Union Tel. Co., 198 P. 146 (Colo. 1921) (popular vote could not prevent state court's enforcement of the Constitution).

3. No tenable theory excuses the state courts from responsibility for deciding an issue of nonrepublican governance in a proper case. It is not a tenable theory that Article IV, § 4, of the Constitution is not law. It is not a tenable theory that the section is only a grant of power to the United States to intervene in state governments, and that the Constitution leaves states legally free to govern by nonrepublican means. Oregon and the Oregon court make no such claim. It is not a tenable theory that the original act of admitting a state precludes future challenges to the republican character of subsequent amendments. And it is not a tenable theory that states indeed are constitutionally obligated to govern by republican means, but that this constitutional obligation is legally meaningless.

Deciding whether a particular means of governmental action is incompatible with any variant of "republican" government, as the Constitution uses that term, is not an impossible task. If, for instance, a political leader claimed power to govern the states' citizens by decrees, without legislative delegation or control, a state court could determine that lawmaking by decree is nonrepublican even if a plebiscite had endorsed such executive power by a majority vote of "yes" (or, elsewhere in this century, "si," "ja," or "da".) The United States Constitution does not leave state courts in the helpless condition of many courts abroad when faced with plebiscitary dictatorships.

This does not imply another form of substantive review of state laws for "civic republicanism", as some recent theories might suggest. The test of republican governance is the legitimacy of a lawmaking process for the kind of lawmaking in question. It is an issue that Congress cannot effectively resolve for a state, but that is entirely suitable for state court determination.

4. Many state courts have in fact reviewed claims of nonrepublican governance on the merits without adverse consequence to the nation. Uniformity among those decisions is

no more essential than uniformity among state constitutions themselves. Moreover, denying state courts that authority does not prevent divergence among state interpretations of the Constitution's command to maintain a "republican form of government." It merely leaves this legal issue to the unreviewable decisions of government lawyers and officials, without the constraint of principled argument and reasoned opinions in the state's courts, as the Oregon court now proposes to leave it in Oregon.

V. CONCLUSION

Because the decision below misinterprets a decision of this Court and conflicts with decisions of other state courts, on an issue of state court authority of fundamental importance to state governments, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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